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No. 91-206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHILDREN OF BEDFORD, INC. and MACMILLAN, INC.,

Petitioners,

—against—

ANGELO PETROMELIS, GENNARO A. FISCHETTI, GEORGE L. GROBE, JR., and DIANE MCGRATH, Constituting the CRIME VICTIMS BOARD OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does New York Executive Law § 632-a violate the First Amendment to the U.S. Constitution because it requires any person or entity that contracts to pay a criminal for discussion or re-enactment of her crime to give all money owed the criminal to the New York State Crime Victims Board for the benefit of the victims of that crime?

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INTRODUCTION

This is an appeal by petitioners, a charitable foundation created to receive the profits from the book *Stranger In Two Worlds* and the publisher of that book, from a judgment of the New York Court of Appeals (1a-29a)[1] which affirmed the judgments of the Supreme Court of the State of New York (32a-58a) and the Appellate Division of the Supreme Court. (30a-31a) The New York Court of Appeals declared that

1 ("__a") refers to the Appendix to the Petition for a Writ of Certiorari.

Executive Law ("Exec. Law") § 632-a, which requires any person or entity to turn over profits owed to a criminal who tells the story of her crime so that victims of that crime may recover for their injuries, is constitutional under the First and Fourteenth Amendments to the U.S. Constitution and Article I, Section 8 of the New York Constitution. This Court will address the First Amendment challenge to Exec. Law § 632-a in the case *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, No. 90-1059, *cert. granted*, 111 S. Ct. 950 (February 19, 1991).

Statement of the Case

I. Executive Law, § 632-a

A. The Statute

In 1977, New York enacted a statute, Exec. Law § 632-a,[2] entitled "Distribution of moneys received as a result of the commission of crime," which applies the equitable principle that no person shall be permitted to profit by her own wrongdoing to criminals who profit from selling the story of their crime. A complete discussion of Exec. Law § 632-a's provisions is contained in the Brief for Respondents submitted in *Simon & Schuster*, dated May 29, 1991, at pp. 1-7.

Exec. Law § 632-a(1) requires that any person or entity that contracts with a criminal regarding the reenactment or discussion of a crime committed by the criminal turn over to the New York State Crime Victims Board (the "Board"), an executive agency charged with enforcing the statute, a copy of the contract and the money owing to the criminal under the contract. The Board then holds the money in an escrow account for five years, and, during that time, the crime victim or the crime victim's estate can bring a civil lawsuit against the criminal, and is not subject to the regular statute

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2 The statute is reproduced in the Appendix to the Petition for A Writ of Certiorari at pages 59a-65a.

of limitations for a tort or wrongful death action.[3] Exec. Law § 632-a(7).

The money in the escrow account goes to satisfy the judgments obtained by victims of the crime. Exec. Law § 632-a(2). The statute prohibits criminals from transferring their legal interest in the profits to other entities. Executive Law § 632-a(9) prohibits any action taken by a criminal "by way of execution of a power of attorney, creation of corporate entities or otherwise" that defeats the purpose of the statute.

The money in the escrow account is distributed in accordance with priorities set forth in the statute to ensure that the victims are paid before the criminal as well as before other judgment creditors, except that a percentage of the account is available to the criminal to pay legal fees in her criminal case and to a representative who assisted the criminal in producing the criminal's speech. Exec. Law §§ 632-a(8), (11).[4]

New York's statute attempts to redress the unfairness of criminals profiting from their crime story before their victims are compensated for their injury and suffering. Without the special procedural protections in New York's statute, a criminal could be paid a large sum of money for selling the story of her crime while her victims would be left without any meaningful remedy to recover for their injury and suffering. While the statute attaches the criminal's profits for the sake of victims, as the publication of *Stranger In Two Worlds* demonstrates, it does not prohibit a criminal from speaking about her crime nor does it prohibit a publisher from publishing the criminal's reenactment or discussion of the crime. Moreover, the statute does not require a publisher to forfeit his profits or to edit discussion of a crime from a book.

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3 *See*, New York Civil Practice Law and Rules §§ 214(5), 215(3) and 215(8) (McKinney Supp. 1990); New York Estates, Powers & Trust Law § 5-4.1 (McKinney 1981 & Supp. 1991).

4 The State is also reimbursed for any money it paid the victims under Exec. Law, Article 22, New York's general victim compensation scheme, but not to exceed one-half of the victim's judgment. Exec. Law § 632-a(11)(b).

B. Legislative History

For a complete exposition of Exec. Law § 632-a's legislative history respondents respectfully refer the Court to the Brief for Respondents submitted in *Simon & Schuster* at pp. 8-10.

II. Executive Law § 632-a And Stranger In Two Worlds

In 1981, Jean Harris, headmistress of an exclusive high school in Virginia, was convicted of Second Degree Murder in connection with the death of Herman Tarnower, M.D., her lover of ten years, at his home in Westchester County. (A. 246)[5] She is serving a term of fifteen years to life at Bedford Hills Correctional Facility ("Bedford") in New York for that crime. *Id.*

In January, 1985, petitioner Macmillan, Inc. ("Macmillan"), a book publisher, and Ms. Harris's literary agent, the Lantz Office, undertook negotiations for the publication of a manuscript by Ms. Harris. (A. 284) On March 19, 1985, Ms. Harris entered into a contract (the "Contract") with Macmillan for a book provisionally entitled, *JEAN HARRIS: Autobiographical Reflections*. (A. 82-88) The Contract memorialized an agreement between Ms. Harris and Macmillan under which Macmillan was given the exclusive rights to an autobiographical work by Ms. Harris. Under the terms of the Contract, Ms. Harris was to receive a $50,000 installment upon signing the Contract and another $50,000 upon delivery of the manuscript to Macmillan. (A. 82) In addition, the Contract provided for royalties to be paid to Ms. Harris based upon the number of copies of the book sold. *Id.* The money for the first installment was paid to Ms. Harris through the Lantz Office, which retained $5,000 as its commission. Jean Harris used approximately $20,000 of the first $50,000 paid to her by MacMillan for her book *Stranger in Two Worlds* to pay her outstanding legal fees. In July, 1985, Macmillan advised the trade that Jean Harris's book was "full of new

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5 ("A. ___") refers to the Appendix in the New York Court of Appeals.

facts about her relationship with Hy Tarnower, her lover for over a decade whom she ultimately murdered" and that Ms. Harris "comes to terms with herself and recounts why she murdered her lover." (A. 63)

In late 1985, Ms. Harris delivered a manuscript entitled *Stranger In Two Worlds* to Macmillan. (A. 35) It was published under that title in May, 1986. *Id.* The book is divided into two parts. Part I describes Ms. Harris's early life, her relationship with Dr. Tarnower, his death and her subsequent trial and conviction for his murder. Part II describes Ms. Harris's life and work at Bedford. (A. 35-36) Two chapters in Part I are devoted to the discussion of the crime and the trial; they are chapters 9 and 10 entitled, "Harrison, New York: The End of the Line," (pages 124-149); and "Westchester: The People of New York vs. Jean Harris" (Pages 150-192), respectively. Ms. Harris concedes that she described her crime and her thoughts, feelings, opinions and emotions about it by selective use of the trial transcripts. (A. 277)

In April, 1986, petitioner, Children of Bedford, Inc. (the "foundation"), a not-for-profit corporation, was established at Ms. Harris's direction. (A. 107, 278) She then assigned all her royalties under the Contract to the foundation in order to benefit children whose mothers were incarcerated in Bedford. *Id.* By her own admission, Ms. Harris's purpose in establishing the foundation was to protect income derived from the book from Section 632-a. (A. 278)

III. The Administrative Proceedings

The Board first learned of the Contract in February, 1986, when Macmillan issued publicity releases trumpeting the arrival of a book by Jean Harris about "the crime of the century—by a woman convicted of committing it." (A. 89, 247-48) The Board immediately began an investigation to determine if the Contract came within the purview of Section 632-a. (A. 248-50)

After completing its investigation, the Board issued a Proposed Determination and Order ("Proposed Order"), dated

July 29, 1986, finding that *Stranger In Two Worlds* contains Ms. Harris's version of a reenactment of the crime for which she was convicted, as well as her thoughts, feelings, opinions and emotions regarding the crime. The Board's proposed determination identified two chapters of the book, pages 123 through 192, that involved "detailed reenactment of the crime, as well as numerous expressions of Ms. Harris's thoughts, feelings and emotions about the crime." (A. 77) The Proposed Order concluded that the Contract and the book published thereunder fell within the purview of Section 632-a, that any assignment, such as that made by Ms. Harris to the foundation, was void pursuant to Exec. Law § 632-a(9), and that all money paid to or due to Ms. Harris under the Contract should be turned over to the Board to be held in escrow for the victims of the crime committed by Ms. Harris. (A. 75-80) The foundation, Macmillan and the Lantz office filed timely objections to the Proposed Order. (A. 270-73) Hearings were held before a Board member and on October 26, 1987, the Board issued its Final Determination and Order ("Final Order") which adopted the Proposed Order. (A 59)

IV. The Proceedings and Decisions of the New York Supreme Court

The foundation commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules, dated November 30, 1987, in the Supreme Court, New York County. (A. 31) In its petition, the foundation sought to annul the Board's determination that *Stranger in Two Worlds* was subject to Exec. Law § 632-a and asserted that the law was not meant to cover assignments by a criminal-author to a legitimate charity. (A. 38) The foundation also alleged that the statute was invalid under the First Amendment to the U.S. Constitution and under Article I, Section 8 of the New York Constitution. (A. 37-38)[6] Macmillan intervened in the

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6 The foundation also claimed that the administrative proceedings in this case violated the Due Process Clause of Fourteenth Amendment of the U.S. Constitution because the Board gave inadequate notice

proceeding as a petitioner. (A. 143) Petitioners submitted to the New York court the affidavits from the *Simon & Schuster* case now before this Court.

In a decision dated April 12, 1989, the New York Supreme Court rejected all of petitioners' claims. *Children of Bedford, Inc. v. Petromelis*, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1989) (42a). In addressing petitioners' contention that Exec. Law § 632-a violates the First Amendment, the court reasoned that the statute was not directed at the criminal's ability to speak, but only at his or her ability to profit from speech about the crime. The court noted that it neither prohibits a person from communicating the details of a crime or his thoughts or feelings about the crime nor prevents the press from functioning (and profiting) as an instrument for the communication of such information. (42a)

The court then stated that even if the statute might have some inhibiting effect on expression, it survives scrutiny under the balancing test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). The court found the State's interest in providing a source of funds to compensate victims of publicized crimes significantly outweighed "the minimal impact on the dissemination of information." (46a) The court also found that any burden that the statute might have on First Amendment activity was the result of a narrowly tailored statute serving a compelling state interest. (47a)

The Supreme Court entered a judgment denying the petition and declaring Exec. Law § 632-a to be constitutional under the First and Fourteenth Amendments to the United States Constitution and under Article I, Section 8 of the New

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of which parts of the book were covered by the statute and the Board combined prosecutorial and adjudicatory functions in its administrative determination. (A. 38) These claims have been rejected by the New York Court of Appeals. *See* 10a-12a. Petitioners have not sought review by this Court of the issues concerning due process, the validity of the assignment to the foundation, or whether the statute applies to Ms. Harris's use of trial transcripts to discuss her crime, and therefore these issues will not be discussed further.

York Constitution. (53a-58a) The Appellate Division, First Department, unanimously affirmed the Supreme Court's judgment for the reasons set forth in the Supreme Court's decision. 161 A.D.2d 503, 556 N.Y.S.2d 483 (1st Dep't 1990) (30a-31a)

V. The New York Court Of Appeals Decision

In an opinion dated May 7, 1991, the New York Court of Appeals unanimously affirmed the Supreme Court's judgment but on different grounds than those set forth in the Supreme Court's opinion. The Court of Appeals concluded that Section 632-a directly burdens speech because "it singles out a category of speech based on subject matter and imposes special burdens on that category." (3a) The court also found that "the statute imposes a burden on the criminal's speech by regulating the financial aspect of it." (13a) Accordingly, the court stated that in order to uphold the statute, the State must demonstrate that the statute "serves a compelling state interest and is narrowly tailored to achieve that purpose (*see, Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 231 [1987])." (15a)

The court determined that the State had met its burden. The court found that Exec. Law § 632-a preserves "the victim's equitable right to assets earned by a criminal as a result of the victimization." (16a-17a) The court recognized the statute as a "codification of the fundamental equitable principle that criminals should not be permitted to profit from their wrongs and an expression of the penological concept which provides that victims expect and are entitled to "retributive satisfaction from our criminal justice system." (18a) (citations omitted).

The court further determined that Exec. Law § 632-a is narrowly tailored "to meet the state's compelling interest in securing a victim's equitable right to be compensated from moneys earned by a criminal as a result of the victimization" because the statute "creates a unique and identifiable resource and preserves it for the benefit of victims," gives the

victim priority over other creditors, and extends the time within which a victim may bring an action against the criminal. (25a) The court noted that the statute does not regulate the right to speak about crime but only the criminal's receipt of money, and does not prohibit the publishing of the criminal's story. (25a)

THE PETITION SHOULD BE DEFERRED AND THEN DECIDED IN ACCORDANCE WITH THIS COURT'S DECISION IN *SIMON & SCHUSTER*

Consideration of this petition should be deferred pending this Court's decision in the *Simon & Schuster* case. Deferment is appropriate because the issue presented by petitioners in *Children of Bedford* is squarely addressed in the *Simon & Schuster* case, which is already scheduled for argument. Petitioners, citing *Keney v. New York*, 388 U.S. 440 (1967), also suggest, as an alternative to granting review in this case, that the Court should postpone consideration of the petition until the resolution of the *Simon & Schuster* case. Petition at p. 8.

In *Simon & Schuster*, the petitioner challenges the facial validity of Section 632-a, as well as its application to Simon & Schuster's payments to Henry Hill for *Wiseguy*. Petitioners in this case also challenge the statute on its face and as applied to Ms. Harris's profits from *Stranger In Two Worlds*. The issue of the facial validity of the statute has been fully briefed in *Simon & Schuster* and the petition does not raise any new or significant issues that are not presently before this Court in *Simon & Schuster*.[7] A comparison of the courts' reasoning in *Simon & Schuster* and *Children of Bedford* reveals the similarity of the two holdings. For example, the majority in *Simon & Schuster* found that New York has a compelling interest "in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of

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7 Petitioners have abandoned their Fourteenth Amendment claims raised below and, therefore, this case can be disposed of in accordance with any decision reached in *Simon & Schuster*.

their victimization." *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 782 (2d Cir. 1990). The New York Court of Appeals held that Section 632-a serves the compelling interest of preserving "the victim's equitable right to assets earned by a criminal as a result of the victimization," (16a-17a), and preventing criminals from "salt[ing] their victims' wounds by profiting from the victimization without recompense for the victims." (18a).

With regard to the facial validity of the statute, the challenge to the statute in these two cases is identical. With respect to the application of the statute, petitioners do not explicitly argue that Section 632-a is unconstitutional "as applied" to *Stranger In Two Worlds*, but assert that the book is "a serious and provocative study of life in a woman's prison" which "did not seek to 'exploit' the crime of which [Ms. Harris] was convicted", and that the statute's "broad sweep" wrongfully enfolds Ms. Harris's book. Petition at pp. 2-3. Petitioners' purported as applied challenge to the statute does not raise any separate, novel, or significant issue to warrant this Court's review.

Therefore, it is appropriate for the Court to defer consideration of the petition until a decision is rendered in *Simon & Schuster*. If Section 632-a is upheld by this Court in *Simon & Schuster*, the Court should deny this petition because no significant issue will remain in *Children of Bedford*. If Section 632-a is overturned only as applied to Simon & Schuster, the Court should also deny the petition here. If the statute is struck down on its face in *Simon & Schuster*, then the Court should vacate the judgment of the New York Court of Appeals and remand the case to that court for further proceedings consistent with this Court's opinion in *Simon & Schuster*.

CONCLUSION

The consideration of the petition for writ of certiorari should be deferred pending the decision in the *Simon & Schuster* case.

Dated: New York, New York
September 16, 1991

Respectfully submitted,

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